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Workmen's Compensation

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WORKMEN'S COMPENSATION

The issue in *Arnold v. Benjamin Booth Company*[1] was whether the respondent employee's testimony alone, unsupported by medical evidence, was sufficient to support the commission's finding of a causal connection between the employee's disability and an accident which aggravated a preexisting injury. The South Carolina Supreme Court held that it was sufficient, relying primarily on its 1968 decision in *Mize v. Sangamo Electric Co.*[2]

In May, 1969, the employee had suffered an injury in the course of employment but made no claim for workmen's compensation; he later testified that after the injury he had continually had trouble with his back and had complained about it frequently. In October of 1969 he was discharged for poor attendance, but was rehired roughly three weeks before the accident in question and continued to complain about his back until the accident. On June 3, 1970, he was cleaning floors when an engineer with the company asked him to help move a desk. The employee testified that he protested that he was having back pains and could do no lifting, but that his complaints were ignored. He stated that when he lifted the desk some two inches off the floor he "felt something pull" in his back, and afterwards informed the engineer of the injury and at lunch time went home to get something for it.

The employee had admitted slipping and falling on his back in his own yard on May 29, 1970, and the engineer had

1. 257 S.C. 337, 185 S.E.2d 830 (1971).

2. 251 S.C. 250, 161 S.E.2d 846 (1968). The Court in *Arnold* at 257 S.C. 339, 185 S.E.2d 832, stated:

> Circumstantial evidence and lay testimony can be sufficient to support a finding of causal connection in a Workmen's Compensation case. Such evidence need not reach such a degree of certainty as to exclude every reasonable or possible conclusion other than that reached by the Commission. It is sufficient if the facts and circumstances proved give rise to a reasonable inference that there was a causal connection between the disability and the prior injury. Whether the absence of medical testimony is conclusive on the question of causation depends upon the particular facts and circumstances of the case.

testified for the appellants that the employee had made no protests about moving the desk and had only said afterwards that he was going home to get some pills for his back. Nevertheless, the supreme court affirmed the circuit court's decision upholding the commission's award of temporary total disability, invoking the principle that the commission is the fact-finding body and that questions of law for the court to decide are presented only where the evidence gives rise to but one reasonable inference.[3]

The Court noted its prior decisions holding that a compensable injury occurs when a previously existing disease or condition is aggravated by an injury arising out of or in the course of employment,[4] and relied on its decision in *Mize v. Sangamo*.[5] It pointed out that Arnold's injury was not such as would involve testimony of medical experts alone and concern areas of science or specialization of which laymen could have no knowledge;[6] it also distinguished the situation in this case from others involving medical testimony.[7]

Evans v. Carolina Shipping Company,[8] involving the Federal Longshoremen's and Harbor Workers Compensation Act,[9] was an appeal from a third party claim which originated from an action brought by an injured longshoremen against the shipowner whose ship he was unloading.

Norris Evans, the longshoreman, was an employee of Carolina Shipping Co., the stevedoring company unloading the ship owned by Overseas Maritime, Inc. Evans was injured

3. Polk v. E. I. du Pont de Nemours Co., 250 S.C. 468, 158 S.E.2d 765 (1968).

4. Gordon v. E. I. du Pont de Nemours Co., 228 S.C. 67, 88 S.E.2d 844 (1955); Glover v. Columbia Hospital, 236 S.C. 410, 114 S.E.2d 565 (1960).

5. 251 S.C. 250, 161 S.E.2d 846 (1968).

6. 250 S.C. 468, 158 S.E.2d 765 (1968).

7. At 257 S.C. 342, 185 S.E.2d 832, the court said:

> This not a case where there was medical evidence presented but it failed to meet the "most probably" test, *Cross v. Concrete Materials*, 236 S.C. 440, 114 S.E.2d 828; nor a case where medical testimony negated the possibility of the disability being caused by the accident in question, *Dennis v. Williams Furniture Corp.*, 243 S.C. 53, 132 S.E.2d 1; nor a case where there is a conflict between lay and expert testimony, *Rollins v. Wunda Weve Carpet Co.*, 255 S.C. 1, 177 S.E.2d 5 (emphasis added).

8. 451 F.2d 188 (4th Cir. 1971).

9. 33 U.S.C. §901 *et seq.*

when a bale of cotton piece goods fell back into the hatch of the ship while it was being unloaded; Carolina Shipping Co. paid him $25,663.28 in compensation under the Longshoremen's and Harbor Workers' Compensation Act.[10] Evans then brought suit against Overseas Maritime, which settled with the injured longshoreman for the sum of $137,500, plus the assumption by Overseas of payment of the subrogation claim of Carolina Shipping, in the event that it became due. Overseas Maritime then brought an action for indemnification[11] against Carolina Shipping, who counterclaimed for reimbursement of its lien for medical and compensation payments.[12] The U.S. District Court for the District of South Carolina, at Charleston, in an action tried without a jury, found for the shipowner,[13] dismissing Carolina's counterclaim.

The District Court found that Carolina Shipping had breached its implied warranty to unload in a safe and workmanlike manner and granted the shipowner the sum of $137,500, plus the extinguishment of Carolina's subrogation lien. The court pointed out that under the clear terms of the release the settlement contemplated was for a gross figure of $163,163.28, which amount included as consideration the assumption by Overseas of the compensation lien of Carolina in the event that Carolina should make a claim against Evans

10. 33 U.S.C. §914 (a) provides:

> Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled, thereto, without an award, except where liability to pay compensation is controverted by the employer.

11. Under the Longshoremen's and Harbor Workers' Compensation Act, a third party sued by an injured employee is entitled to indemnity from the employer where the injury occurs as a result of a breach by the employer of a duty to the third party which necessarily inheres in the contractual obligation assumed by the employer in his contract with the third party. Ryan Stevedoring Corporation v. Pan-American Steamship Corporation, 350 U.S. 124 (1956); *See generally* Amerocean Steamship Company v. Copp, 245 F.2d 291 (9th Cir. 1957), Rich v. United States, 177 F.2d 688 (2nd Cir. 1949), Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers,* 103 U. OF PA. L. REV. 321 (1954).

12. For a discussion of employers' liens of this nature under the Longshoremen's and Harbor Workers' Compensation Act, see Mitchell v. The Etna, 138 F.2d 37 (3rd Cir. 1943); *see generally,* International Terminal Operating Co. v. Waterman Steamship Co., 272 F.2d 15 (2nd Cir. 1959), Petition of Sheffield Tankers Corporation, 222 F. Supp. 441, (N.D. Cal. 1963), Potomac Electric Power Company v. Wynn, 343 F.2d 295 (D.C. Cir. 1965).

13. Evans v. Overseas Maritime Co., 330 F. Supp. 654 (4th Cir. 1970).

for the lien; thus the parties intended that the compensation lien of Carolina Shipping was to be extinguished if Overseas prevailed in its action for indemnification against Carolina, but that if Carolina had prevailed, then Overseas would have been obligated under the release to pay Carolina $25,663.28, the full amount of its lien.

On appeal the Fourth Circuit Court of Appeals affirmed. It found the evidence sufficient to support the findings of the district court that Carolina had breached its implied warranty to unload the ship in a safe, workmanlike manner.

The Court of Appeals also approved of the district court's extinguishment of Carolina's subrogation lien, giving several factors for its decision. Carolina had agreed that the payment to Evans "net" was reasonable and just, at a time when it was thought that Overseas would contribute half of the sum paid to Evans without reimbursement. Also, the counsel for Carolina Shipping had admitted that payment to Evans of $137,500 plus an additional $25,663.28 for his compensation benefits would not be excessive, considering Evans' age and earning capacity and the severity of his injuries. Lastly, the court emphasized the fact that the shipowner's agreement with the injured longshoreman to reimburse Carolina Shipping was indistinguishable from methods of settlement held to be permissible in the 1st circuit in *Jarka Corp. of New England v. United States Lines Co.*[14]

The most interesting case dealt with in this survey period was *Sexton v. Freeman Gas Company*,[15] involving the question of whether Carroll Sexton's death at a train crossing while returning to his office after a trip to the barbershop, occurred within the course of employment.[16] Sexton's widow's claim for benefits was granted by the hearing commissioner, then denied in a split decision by the full commission, but reinstated by the circuit court. On appeal the issue was whether the full commission's finding that the accident did not occur within the course of employment was supported by the evidence. The South Carolina Supreme Court held that Sexton's death did occur within the course of employment.

14. 387 F.2d 436, 438 (1st Cir. 1967).
15. 258 S.C. 15, 187 S.E.2d 128 (1972).
16. S.C. CODE ANN. §72-401 (1962) provides in part:
Injury shall mean only injury by accident arising out of and in the course of the employment . . . .

Sexton was the salaried manager and service and installation mechanic of the gas company's Chesnee office, which included two other employees who were paid on an hourly scale. Sexton's schedule was irregular and undefined—he was free to structure his time and activities in any fashion he chose, consistent with the successful management of the gas company's business. Occasionally he had to respond to emergency calls at night or on weekends. He was always "on call," whether at home, in the office, or in the company truck, which was equipped with a two-way radio and which he was free to use for travel from home to work.

On the afternoon of his death Sexton had left the office in the truck to get a haircut, telling the secretary that he would return as soon as possible. On leaving the barbershop he proceeded directly to the outskirts of town to the scene of a brushfire which had previously threatened a home containing one of the gas company's cylinders. After rendering some few minutes assistance in fighting the fire, he left on the shortest route back to the office. The owner of the home had testified that the fire was at one time within some seventy-five to one-hundred feet of his house. Also, there was evidence that Sexton had often checked other such fires to determine the safety of the company's tanks. Nevertheless, the commission found that his activity at the fire was not in the interests of the employer.

The fluid pattern of activity which characterized Sexton's employment was the important factor in this case. Conceding the conclusiveness of the commission's finding that Sexton's activity at the brushfire was not in the interests of his employer, the supreme court noted that such finding nonetheless was not determinative (as the commission had apparently assumed) of the issue of the scope of employment at the time of the accident. The court noted that at any time while in the truck he might have been called via radio to attend to company business, and held that, "under the circumstances which have been related, when he left (the brushfire) and began traveling the shortest route back to the office, he resumed the course of his employment."[17]

Because of the unusual fact situation presented, the court was at a loss for direct authority, but reasoned,

17. 258 S.C. 15, 19, 187 S.E.2d 128, 129 (1972).

> While we have found no case involving a similar employer-employee relationship, the principles involved in dealing with certain analogous situations point to the conclusion we have reached. For example, we have recognized that there are exceptions to the general rule of noncompensability for injuries sustained during the basic trip to and from work. These exceptions include cases where, "in going to and returning from work, the means of transportation is provided by the employer, or the time thus consumed is paid for or included in the wages," or where "the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment." Gallman v. Springs Mills, 201 S.C. 257, 263, 22 S.E.2d 715, 718 (1942). Similar exceptions generally obtain when the employee's travel to and from the premises occurs at lunchtime. 1 A. Larson, Law of Workmen's Compensation, Sec. 15.52 (1968).[18]

Pointing to the precept that the commission is the fact-finder and is not to be reversed on such issues of fact unless the evidence leads to but one reasonable inference, Justice Littlejohn in his dissenting opinion felt that the claimant had failed to meet the burden of proof that the accident had occurred within the course of employment. Justice Littlejohn argued that whereas the Commission had succinctly outlined the factual basis of its findings, neither the circuit judge nor the majority opinion showed evidence sufficient to justify their conclusions. Justice Littlejohn also felt that both the majority opinion and the respondent's counsel had misstated the question involved.[19]

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18. *Id. Compare* the court's holding with cases cited in 99 C.J.S. *Workmen's Compensation* §222 (c) (1958). *See especially,* Clegg v. Motor Finance Corporation, 28 A.2d 533, 20 N.J. Misc. 437 (1942). It is the opinion of the writer that the *Sexton* case will in the future be limited to its facts.

19. The respondent maintained that the issue was whether the employee was entitled to application of the principle of law that, where an employee is found dead at a place and time where his employment reasonably requires him to be, there is a presumption of fact that his death arose out of and in the course of employment, citing Floyd v. Greene Plumbing and Heating Company, 255 S.C. 352, 179 S.E.2d 28 (1971), Halpern v. De Jay Stores, 236 S.C. 587, 115 S.E.2d 297 (1960), Owens v. Ocean Forest Club, 196 S.C. 97, 12 S.E.2d 839 (1939), Jake v. Jones, 240 S.C. 574, 126, S.E.2d 721 (1962), Steed v. Mt. Pleasant Seafood Co., 236 S.C. 253, 113 S.E.2d 827 (1960).